

June 2021

## If Not the State Bar Examination - What?

Gordon Johnston

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

---

### Recommended Citation

Gordon Johnston, If Not the State Bar Examination - What?, 28 Dicta 339 (1951).

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

5. *Investigation of Applicant.* The present method of investigation in Colorado of attorney applicants has been previously discussed. Affidavits are a grossly inadequate substitution for a thorough investigation.

6. *Conclusion.* Colorado adheres only sketchily to adequate safeguards with respect to attorney applicants. It provides inadequate character investigation and registration. It makes no pretense of publicity concerning applicants in this class. It does not use the facilities of the National Conference of Bar Examiners.

---

## IF NOT THE STATE BAR EXAMINATION— WHAT?

By GORDON JOHNSTON

*of the Denver Bar; Dean of the College of Law,  
University of Denver*

It is fairly open to question whether we in Colorado have yet evolved the best of all possible methods of determining who shall be admitted to the sometimes dubious privilege of practicing law in our colorful confines. We have I am sure done very well; it is certainly not the purpose of this paper to suggest any grave shortcomings in our present rules and procedures concerning admissions. The legal education and admissions committee of the State Bar Association which is responsible for this issue of *Dicta* has directed me to report upon procedures for admitting bar applicants, different from those now in effect in Colorado, that have been proposed and may merit study.

### THE DIPLOMA PRIVILEGE

The unpleasant task of weeding out the unfit among those who, for reasons good or entirely perverse, desire to be lawyers, has never rested solely upon the collectively broad shoulders of the bar examiners. We teachers in the law schools catch it first. The dean is the meanest man of all, for he must in the first instance decide who shall be admitted to the study of law and upon whom the door shall be closed—closed with as gentle a bang as possible, for the sake of public relations, but closed nonetheless firmly. The process of student selection has been bettered in recent times, though it is no more uniform in our Colorado schools than in law schools throughout the nation. In general, an applicant must now have a pre-legal scholastic average above that which suffices for a baccalaureate degree; he must face the discouragement of a personal interview with a dean who, pleasant fellow though he may be at home, adopts a chilling "show me" attitude toward the intending registrant; he is urged to take an aptitude

test that may reveal a lack of what it takes and lead to his rejection; and he must file an application blank setting forth full information concerning such pertinent and impertinent matters as his employment record and his criminal record, if any. All of which is good as far as it goes, but it doesn't go far enough.

The time may well come when pre-legal work will be more rigidly prescribed and more severely scrutinized, when methods of obtaining reasonable proof of an applicant's adequacy in the use of the English language will have been devised and applied, and when tests for ethical fitness will be reliable. We are still groping toward it; the burden is upon the schools, not the profession.

The would-be lawyer who survives to his degree attends the law school for a minimum of three years. Every teacher worth the fabulous salary paid him is on the alert as a part of his job to eliminate those who, for the best interests of all, should be shunted into some other field. Of an entering class of fifty, not more than twenty will finally take a bar examination; discouragement, lack of sustained interest, financial need, domestic discord—these things as well as scholastic failures account for the casualties. But it may fairly be suggested that here, too, the schools must tighten up, to permit no man to receive his degree who, if admitted to the bar, will not be a credit to the profession: well trained, competent, honest, imbued with a sense of public service.

If the schools measure up to their responsibilities, may it then be argued that there is no need for a bar examination? In short, should the diploma privilege prevail? There are those, and surprisingly they are not confined to our students, who answer yes. The faculties of our law schools emphatically say no, and nearly all practicing lawyers swell the chorus of dissent.

#### RESPONSIBILITY OF PRACTITIONERS

There are numerous propositions to support the position the schools take. We *can* graduate those whom we should not, and, despite our diligence, we sometimes do; we are glad to have the bar examiners assume the responsibility of conferring the right to practice. We believe that the ultimate determination of matters of admission into what we recognize is a public profession should lie in the hands of the practicing members of that profession. We want to keep in close touch with the practicing lawyers, and here is an excellent opportunity; they and we are working toward the same ends. As teachers we are grateful to the bar examiners for undertaking a task we would necessarily have to perform ourselves had they not assumed it: a final examination over the whole field of law is an essential part of the educational process. When the end of his law course has been reached, the student must at last be obliged to discover for himself what we have so frequently told him but so rarely had a chance to illustrate, that

the law is indeed a seamless web. In his preparation for a bar examination the student may for the first time have his eyes opened to the astonishing truth of that truism. And finally, we have no fear of the bar examinations; if our teaching is sound, this test will establish the happy fact—if it is not, we want to know it. Our own reputations as well as our sense of duty to the profession and to the public cause us to welcome this double assurance that our graduates are properly prepared to practice law.

But candor compels me to admit that I am now indulging in the whimsical and quite futile pastime of beating a long dead horse. There is not I think the remotest possibility that we in Colorado will forswear allegiance to a policy steadfastly maintained since 1892 by a notable spokesman for the legal profession: "The American Bar Association is of the opinion that graduation from a law school should not confer the right of admission to the bar, and that every candidate should be subject to an examination by public authority to determine his fitness."<sup>1</sup>

#### ANNUAL BAR EXAMINATIONS AND INTERNESHIP

Careful readers of this esoteric journal will recall a provocative essay proposing new admission procedures, written by a former president of the Colorado Bar Association whose name is rarely relegated to a footnote.<sup>2</sup> In brief, it is his proposal that at the end of *each* of a student's three years in law school, he shall be subjected to a bar examination covering the work of the year last completed. Not more than two yearly examinations could be taken in any twelve months, two failures in any yearly examination would bar the student from taking further examinations, and thus virtually eliminate him from the ranks of potential Colorado lawyers, though he might if he wished and his law school permitted, continue to a law degree, then seek admission in another state and after five years' practice in such foreign state apply for a license in Colorado. If the student successfully passed each annual examination, was graduated from college, and established his ethical qualifications, he would be given a limited license permitting him to appear before all trial courts, but not before any appellate court; he would be required within six months to associate himself with an experienced and approved attorney of his own selection, under whose guidance he would practice for a year. At the end of a three-to-five-year period, this new attorney would be given a further bar examination, testing his competence in appellate practice and procedure in the state and federal courts, and if he passed it and his record withstood close inspection, he would receive an unlimited license. The proposal is wholly original,

<sup>1</sup> Standards of the American Bar Association, 1950 Review of Legal Education, page 27.

<sup>2</sup> William Hedges Robinson, Jr., *An Approach for New Standards of Admissions*, 26 Dicta 205 (1949).

but it has some precedent as to the first year bar examination and the interneship features.

It is understood that this plan has been widely discussed and accorded some approval, though the only printed commentary is an amusing but thoughtful negation of the proposal, written by one who takes genial alarm at the regimentation and paternalism implicit in the scheme, and who professes no fear of the competition of an "overcrowded" bar.<sup>3</sup> "Such a plan," opines the author, "would go far indeed towards wrecking the profession"; it would, he warns, stifle ambition, would unreasonably eliminate those who should be allowed to try again, would starve out the lawyer who with only a restricted license could begin a law suit in the trial courts but could not finish it in an appellate court; it would rule out the young lawyer unable to find an experienced attorney available and willing to take him under his wing, and would, in sum, result in limiting the profession to a favored few and deprive the public of the legal services of many competent men.

It may be added that it would greatly increase the burden upon the Board of Bar Examiners, who even under existing procedures require three months before their grades are announced. Indeed, vastly complex and costly new machinery would be necessary to attempt to put the proposed plan into effect. The law schools eye the proposal askance, for each of the Colorado schools has a curriculum different from that of the others in each of the three years of the program, and no one of them would with any pretense of good cheer accept dictation as to the contents of its schedules.

No other specific suggestion that we in Colorado shall adopt a bar-sponsored interneship program as part of our system of admissions has come to my attention. In passing, it is noted that in other states the interneship question has been fought out, and in a very few a program has been adopted. Since no Colorado proponents have set up the straw man for me to flail away at him, I shall not unduly extend this paper by ponderous consideration of the subject. I shall permit myself just one blow: I do not believe that for us in Colorado the interneship program is fair, favorable or feasible; on the contrary, I think the interneship proposal fallacious, foolish, and far-fetched. That is, I give it an "F"!

#### A NATIONAL BAR EXAMINATION

For over two decades the proposal for a "uniform"—a "standard"—a "national" bar examination has been before us. Our own Will Shafroth seems to have been the first to espouse it in writing,<sup>4</sup>

<sup>3</sup> Allyn Cole, *Another Approach to the Question of New Standards for Admission to the Bar*, 26 Dicta 278 (1949).

<sup>4</sup> Shafroth, *A National Board of Bar Examiners*, 1 The Bar Examiner 160 (1932).

and other Colorado members of the National Conference of Bar Examiners have been articulate in its support.

What is the proposal? I shall present it as it has been outlined by its leading proponents.<sup>5</sup> A National Board of Bar Examiners would be appointed, selected by the joint action of the National Conference of Bar Examiners, the Section of Legal Education and Admissions to the Bar of the American Bar Association, and the Association of American Law Schools. This board would be composed of practicing lawyers, perhaps with a few law teachers included. It would employ a director, assistant director, statistical staff, and stenographic staff, located in a central office. A staff of experts from a panel of teachers of law would by the board be given the job of drafting bar examination questions covering thirteen or more subjects which constitute the core of most of the instruction in the better law schools throughout our country.<sup>6</sup> The examination process would be administered in accordance with such procedures as are similar to those now successfully employed by the Educational Testing Service of Princeton, New Jersey, which gives a uniform law aptitude test four times a year used and accepted by practically all the approved law schools of this country.

This national board would not supplant the present state boards of bar examiners. It would only provide its services to them to assure a professional job, done by persons trained to the purpose, of drawing proper questions and grading the answers fairly and uniformly. Each state board could use the grades of its applicants as submitted to it for determining the ranking of its applicants, but it could and should set the passing mark at whatever point it decided for itself to adopt, and thus would have complete control over admissions in its jurisdiction following each examination.

<sup>5</sup> Only recent and most significant articles are cited. *A Standard Bar Examination*, panel discussion, 16 *The Bar Examiner* 50 (1947); same, 17 *The Bar Examiner* 8 (1947); James E. Brenner, *Improving Bar Examinations: Some Suggestions*, 36 *American Bar Association Journal* 279 (1950); John Kirkland Clark, *Report of Committee on a Standard Bar Examination*, 18 *The Bar Examiner* 16 (1948); Herbert W. Clark, *Standard Bar Examination Under Study*, 18 *The Bar Examiner* 111 (1949); Herbert W. Clark, *A Standard Bar Examination*, 19 *The Bar Examiner* 42 (1950); Herbert W. Clark, *Bar Examinations: Should They Be Nationally Administered?* (a report for the Survey of the Legal Profession) 36 *American Bar Association Journal* 986 (1950); L. Dale Coffman, *A Uniform National Bar Examination*, 23 *Rocky Mountain Law Review* 93 (1950), reprinted 36 *American Bar Association Journal* 623 (1950), reprinted 19 *The Bar Examiner* 221 (1950); *A Manual for Bar Examiners*, 1951 Revision, *The National Conference of Bar Examiners*, 102, 103.

<sup>6</sup> James E. Brenner, *Improving Bar Examinations: Some Suggestions*, 36 *American Bar Association Journal* 279 (1950); Herbert W. Clark, *Bar Examinations: Should They Be Nationally Administered?* 36 *American Bar Association Journal* 986 (1950); George Neff Stevens, *Scope and Subject Content of Bar Examinations*, (a report for the Survey of the Legal Profession) 9 *The Bar Examiner* 99 (1950).

It is an important part of the plan that each state board of bar examiners could request that questions of *local* law be given as a supplemental examination to the standard examination given all applicants. We in Colorado might very properly request that tests covering Water Rights, Oil and Gas, and Colorado Civil Procedure be given to all Colorado applicants. Further, we could have this supplemental examination graded by our own board members if that seemed desirable.

No part of the national service would be compulsory; it would simply be available for those state boards that might care to make use of it. Would it be desirable for us in Colorado to use such a service were it available? In past years we have been committed to the plan. On page 96 of the April, 1949, issue of "The Bar Examiner," publication of the National Conference of Bar Examiners, appears the bold, bald statement, "The Colorado Board of Bar Examiners . . . sometime ago went on record as favoring a standard bar examination in principle."<sup>7</sup>

Action upon the proposal has not progressed far, though a joint committee of the three organizations named above is at work, charged with the duty "to explore the subject further, to devise ways and means for a standard bar examination procedure, and to place the proposal before the various examining boards for their study and consideration."<sup>8</sup>

The cost has by some been thought to be prohibitive; others assert that, assuming adoption of the service by a substantial number of the admitting jurisdictions, at the end of a few years such a national organization could be self-supporting, without assessing applicants to the bar more than thirty-five dollars, the sum Colorado now charges each who is admitted. There are other obstacles besides the cost, but they would not be insurmountable if we lawyers were determined. The doctors have done it, so too have the C. P. A.'s. If those gentlemen have done it, and approved it—why not the lawyers?

The fact seems to be clear that the burden of preparing the examinations and of grading well over one hundred papers twice a year, is greater than our board of volunteers, drawn from the ranks of our busiest and most successful Colorado lawyers, ought to be called upon to undertake. Though each Colorado bar examiner has recently been permitted a paid assistant, the task remains far too heavy.

Criticism of the Colorado bar examination questions is the assignment of another contributor to this symposium. I shall intrude upon his domain only to suggest that some improvement in some of those questions could have been effected on every one of the past examinations. Availability of expert assistance in framing

<sup>7</sup> *A Standard Bar Examination*, 18 *The Bar Examiner* 96 (1949).

<sup>8</sup> *Supra*, note 7.

the questions and in grading the answers might very well result in better examination techniques.

Finally there would be satisfactions for us in Colorado, as for all members of the bar in all the admitting jurisdictions, were we to have some sense of uniformity in the quality of all bar examinations and in the grading. Since we would in no way be abandoning our own control over our own admissions, it would seem that the plan offers us much of benefit and that we have nothing to lose.

#### A REGIONAL BAR EXAMINATION

If and when the national bar examination becomes an accomplished fact, Colorado should I think use its services even as it should now, in my opinion, support the policies shaping it. But it must again be noted that the show first went into rehearsal some twenty years ago and we haven't yet got it on the road. Sadly commenting upon this fact, Mr. Eugene Glenn<sup>9</sup> has advanced another proposal: a regional bar examination.

At a recent conference of the Interstate Bar Counsel<sup>10</sup> held in Denver on February 28, 1951, Mr. Glenn observed, "the thought grew out of the despondency of getting a national bar examination underway, that here in the west we might have a regional bar exam. Our problems are pretty much the same, at least in basic subjects, and there is no reason why the same examination couldn't be given in all or any part of these western states."<sup>11</sup>

He urged that the same arguments that make a national bar examination desirable apply with quite as great force to a western regional examination. He expressed his conviction that, if we pooled our present financial resources and the know-how that has been developed by the best of our western state boards of bar examiners "we could do a scientific job . . . a job which calls for continuous and expert study, evaluation and follow-up which many boards of examiners without expert assistance simply do not have time or opportunity to give . . . We must quit trying to administer examinations on an amateur basis and become professionals . . . The thought we had was if we could get a demand for an improvement, which in time would result in improvement of the quality of the bar and enhancement of our public relations,

---

<sup>9</sup> Chairman, National Conference of Bar Examiners, and vice-chairman, the Committee of Bar Examiners of the State of California.

<sup>10</sup> A council composed of delegates from ten western states (Arizona not participating) representing the governing bodies of the ten state bar associations; it was organized in San Francisco in 1949 "for the purpose of creating an instrumentality through which the eleven bars of the west might explore and exploit the areas of common interest and activity such as legal education, bar examinations at a regional level, and convention programs." The quotation is from the transcript of the proceedings of the last meeting, held in Denver on Feb. 28, 1951.

<sup>11</sup> Transcript of the Proceedings of the Interstate Bar Council, February 28, 1951.



a number of the western states would join in giving a regional examination . . . In a neighborly spirit of cooperation, we can come up with something."<sup>12</sup>

#### EACH STATE TO RETAIN CONTROL

This plan, like that of a national bar examination, includes clear recognition of the right of each state board of bar examiners to supplement the proposed uniform regional examination, made up of questions drawn by experts covering the core subjects of the law school curriculum, with questions based on local law. And again, though the papers would be uniformly graded by experts, each state board would select its own passing grade and thus in fact control its own admissions.

The next meeting of the western Interstate Bar Council is to be held in Portland this winter following adjournment of the mid-year meeting of the American Bar Association House of Delegates. Should not the Denver Bar Association and the Colorado Bar Association consider the position we wish to take upon the proposed uniform regional bar examination, and instruct the representative of our Colorado Board of Governors who will be in attendance?

#### CONCLUSION

I sincerely hope that the following quatrain, author unknown to me, is not copyrighted:

In moments controversial  
My discernment's truly fine;  
I always see both points of view:  
The one that's wrong and mine.

Only within the terms of this terse verse have I presented both points of view on the matters under discussion. It is hoped that consideration of a national bar examination, of a regional bar examination, or yearly bar examinations, of an internship program, even of the possibility of adopting the diploma privilege, will be stimulated by this issue of *Dicta*. I have been assured that letters to the Editor or to the officers of the Bar Associations, will not only be welcomed, they will be read!

---

#### SOUTHWESTERN BAR ASSOCIATION

At a meeting held at Electra Lake, on August 27th, the members of the Southwestern Bar Association elected Lewis M. Perkins of Durango president for the forthcoming year. W. Bruce Jacobson was named secretary-treasurer and Katherine H. Johnson will serve as representative of the Association on the Board of Governors of the Colorado Bar Association.

---

<sup>12</sup> *Supra*, note 10.